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BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

HEARING ON THE IMPACT OF RAILROAD INJURY, ACCIDENT, AND DISCIPLINE POLICIES ON THE SAFETY OF AMERICA'S RAILROADS

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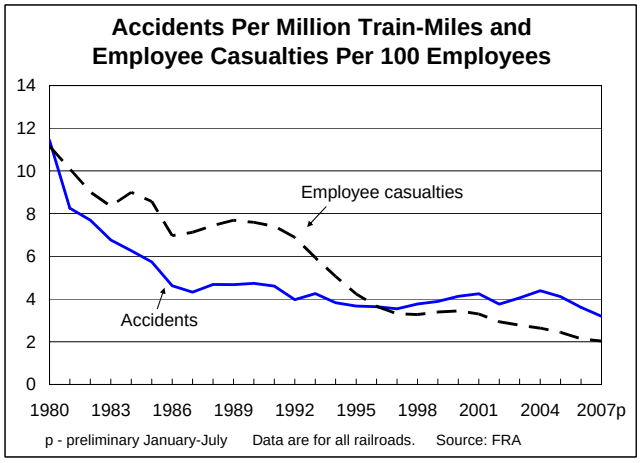
On behalf of the members of the Association of American Railroads (AAR), thank you for the opportunity to address the role of railroad policies in promoting safety. AAR members account for the vast majority of freight railroad mileage, employees, and traffic in Canada, Mexico, and the United States.

Overview of Rail Safety

For railroads, pursuing safe operations is not an option, it is an imperative. It makes business sense and it's the right thing to do. Through massive investments in safety-enhancing infrastructure, equipment, and technology; extensive employee training; cooperation with labor, suppliers, customers, communities, and the Federal Railroad Administration (FRA); cutting-edge research and development; and steadfast commitment to applicable laws and regulations (including those related to accident reporting), railroads are at the forefront of advancing safety.

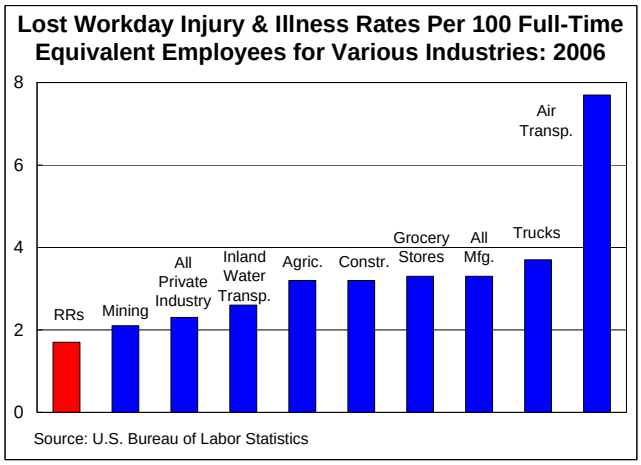
The overall U.S. rail industry safety record is excellent. As an FRA official noted in February 2007 testimony to Congress, "The railroads have an outstanding record in moving all goods safely." In fact, in aggregate 2006 was the safest year for railroads ever. According to FRA data, the rail employee casualty rate in 2006 was the lowest in history, having fallen 81 percent since 1980. Likewise, the grade crossing collision rate in 2006 was the lowest ever, having fallen 76 percent since 1980. And from 1980 to 2006, railroads reduced their overall train accident rate by 68 percent. The train accident rate in 2006 was just fractionally higher



than the record low. The freight itself is also "safer": loss and damage claims as a percentage or rail revenue on U.S. railroads fell from 1.08 percent in 1980 to just 0.22 percent in 2006.

And rail safety continues to improve. According to preliminary FRA data for the first seven months of 2007, the train accident rate, the grade crossing collision rate, and the employee injury rate are all at levels that, if they hold up for the rest of the year, will set new record lows.

According to U.S. Department of Labor data, railroads today have lower employee injury rates than other modes of transportation and most other major industry groups, including agriculture, construction, manufacturing, and private industry as a whole. Available data also indicate that U.S. railroads have employee injury rates well below those of most major foreign railroads.



Railroads are proud of their safety record, which results from railroads' recognition of their responsibilities regarding safety and the enormous resources they devote to its advancement. At the same time, railroads want rail safety to continue to improve. Railroads are always willing to work cooperatively with you, other policymakers, the FRA, rail employees, and others to find practical, effective ways to make this happen.

A commitment to safety that permeates the workplace is critical to promoting safety. Railroads have that commitment. But a healthy balance sheet is important to safety as well. A financially-viable railroad will be in a much better position to invest in

safety enhancements than a financially-weak carrier. The record investments that railroads have made in their infrastructure, equipment, and technology in recent years have made railroads much safer, and these investments were made possible by the moderate improvements in profitability that railroads have enjoyed.

Of course, no budget is unlimited, even for something as important as safety and even for railroads that have experienced financial improvement in recent years. Safety will not be advanced if resources are spent on programs that do little to improve safety or if unfunded mandates lock up resources that would have a more significant impact on safety if spent elsewhere. Unnecessary and unfunded mandates would also serve to increase the cost of rail service and drive more traffic to the highways, where the safety record is far less favorable than it is on the rails.

Intimidation and Harassment of Rail Employees

Some within the rail labor community apparently claim that railroads regularly intimidate and/or harass rail industry employees when the employees are notifying the FRA of an injury or illness, providing accident or incident information to a public official, cooperating with a safety investigation, reporting hours of duty, reporting a hazardous condition, or the like.

Likewise, it has been claimed that railroads regularly deny, delay, or interfere with the medical treatment given to employees.

These claims are false.

Let me be clear: railroads reject the use of harassment and intimidation against their employees, and denounce efforts to withhold or interfere with the provision of needed medical care to injured employees. Railroads value the health and safety of their

employees. Providing immediate medical care is the first priority. Any failure to do so violates internal policy, as well as FRA regulations, and should not happen.

Of course, no industry — especially one with some 185,000 employees — is completely free of workplace pressures and disagreements. Humans are human, and mistakes (by both rail management and rank-and-file employees) are sometimes made. But railroads believe that if actions occur that could be reasonably characterized as "intimidation," "harassment," or "interference" in the provision of proper medical care, they are extremely rare.

Moreover, reasonable actions taken by rail management in the course of a good-faith accident investigation have, at times, been labeled "intimidation" and "harassment" by elements within the rail labor community. Likewise, good-faith efforts regarding the provision of medical care might be labeled "interference" when such an appellation is not warranted. Railroads have an understandable interest in trying to determine, in a timely fashion, why an accident occurred so that the necessary steps to prevent a similar accident in the future can be taken. Railroads also have a keen interest in trying to understand the nature and extent of an employee's injuries in order to determine if and when the employee may be able to return to gainful employment.

In any case, rail employees already have a means — that they have not been shy about using — to pursue claims of harassment, intimidation, and interference under the Railway Labor Act (RLA). The RLA has a unique provision for statutory arbitration of employee claims and grievances before the National Railroad Adjustment Board, or Public Law Boards. Thus, any disciplinary action taken by management can be appealed to a neutral third party arbitrator who can alter or overrule management's actions.

In addition, FRA regulations already prohibit a railroad from taking action "calculated to discourage or prevent [an employee] from...reporting [an] accident, injury, or illness" or "calculated to discourage or prevent [an injured employee] from receiving proper medical treatment." Existing law also already prohibits railroads from discriminating against employees who refuse to work because of hazardous conditions or who complain about a matter relating to federal safety regulation. And railroads already have in place internal prohibitions (and avenues regarding redress) against intimidation and harassment.

Finally, H.R. 1 (the "Implementing Recommendations of the 9/11 Commission Act of 2007"), which was signed into law in August 2007, established a parallel process through which rail employees who believe they have been discharged, disciplined, or discriminated against because of their good-faith efforts related to safety (*e.g.*, cooperating with a safety investigation, refusing to violate safety regulations, notifying an employer of a work-related injury, etc.) may file a complaint with and seek relief from the U.S. Department of Labor.

In short, if cases of harassment, intimidation, or interference in the rail workplace were to occur, rail employees have several different avenues to seek redress.

The Federal Employers' Liability Act (FELA)

One factor that should not be overlooked when considering safety in the railroad industry is the adverse impact of the Federal Employers' Liability Act (FELA). Enacted in 1908, FELA serves as the railroad industry's workers' compensation system. In 2004, the most recent year for which data are available, total FELA payouts by railroads (including claims and lawsuits) totaled more than $750 million.

The vast majority of employees in the United States are covered by no-fault workers' compensation systems, under which workers are compensated for work-related injuries without regard to negligence. Not so for railroad employees. In order to receive compensation for workplace injuries under FELA, railroad employees must prove that their employers' negligence caused an injury. If the employee's negligence is found to have contributed to the injury, compensation is reduced accordingly.

Thus, when a rail employee is hurt on the job, he or she becomes the plaintiff in a potentially sky's-the-limit lawsuit against the railroad, with each side having a strong financial incentive to blame the other for the injury.

From a safety perspective, FELA's promotion of a culture of litigation in the railroad workplace is counterproductive. Injured employees know that in order to collect compensation they must show that the railroad was at fault. Railroads know that if they can prove the employee was at fault, liability can be reduced or even eliminated. Other employees know that their co-workers' right to compensation can hinge on their recollection of events surrounding an accident and testimony about those events. Thus, FELA breeds mistrust in the workplace as employers and employees are pitted against each other.

FELA also hampers railroads' ability to determine root causes. Investigating objectively the causes of workplace accidents and injuries that have occurred, and using this information to evaluate how best to avoid their recurrence, is an essential element of improving workplace safety. However, the need to affix blame for rail accidents provides parties with incentives to be less than candid during investigations. (Indeed information from trial attorneys aimed at rail employees counsel that being uncooperative with accident investigations is in the employee's best interest. For example, a FELA lawyer advises "[Y]ou should not make any statement, either orally or in writing, as to how the accident

occurred or concerning the nature of the injuries until such time as you have been fully advised by your attorney and/or union representative."[1]) This can lead to an obfuscation of the true causes of workplace accidents and lessen the likelihood that safety-related improvements will be made.

When an employee is hurt at work, the primary goals should be effective medical treatment; rehabilitation, if needed; and a return to work. However, FELA's reliance on litigation to determine the right to, and amount of, compensation creates disincentives for rehabilitation of injured workers and a return to the job. A prompt return to work can mean lower economic damages. It also probably means lower non-economic damages, which tend to be a multiple of the economic damages.

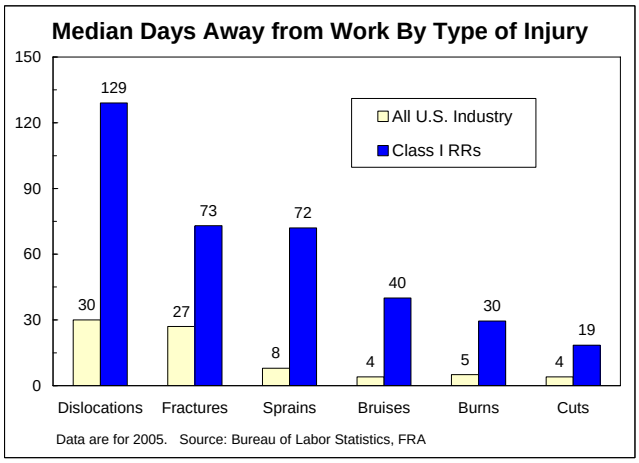
Moreover, a worker who has not returned to the job by the time of trial appears more sympathetic than a worker who is fully recovered and back at work. This creates a strong incentive to forego (or at least delay) rehabilitation, stay off the job, and build up damages in order to present the most favorable case before a jury. Employees' attorneys typically advise their clients along those lines. (For example, a FELA lawyer advises, "As a quick check-list, the six most important factors in establishing a claims value are: 1) The nature, extent and *duration* of the injury; …"(emphasis added))[2]

Available data appear to confirm this point. The median number of days away from work by type of injury is typically far higher for the rail industry than it is for U.S. industry as a whole. For example, in 2005 the median number of days off from work because of a "sprain" was 8 for U.S. industry as a whole, but 72 for Class I railroads. For

[1] From the web site of Paoli, Latino & Kutzman, P.C., a Montana law firm that handles FELA cases for railroad employees, at http://www.paoli-law.com/fela-railroad-claims.php.

[2] From "Answers to the 15 Most Commonly Asked Questions on Federal Employers' Liability Act (FELA) Affecting Railroad Workers," published by the Law Offices of John C. Dearie & Associates, at http://www.dearielaw.com/FELA.pdf

"bruises," the median number of days off from work was 4 for U.S. industry as a whole, but 40 for Class I railroads.



Just as rail labor and management have worked together to reform the railroad retirement system, AAR hopes that rail labor and management can work together to replace FELA with a more effective workers' compensation system that fairly compensates injured employees, enhances safety, and helps to remove a cause of adversarial relations. After all, if FELA is as beneficial to safety as some claim it is, why aren't all U.S. workers subject to a similar system?

Conclusion

Railroads agree that action designed to prevent an employee from reporting an injury, or to discharge, discipline, or in any way discriminate against an employee for notifying the proper authorities of an injury or illness or cooperating with an accident investigation, is unacceptable. So too is interfering with the provision of needed medical attention to an injured employee.

But these are not endemic problems for railroads. To the extent they occur at all, they are extremely rare and are contrary to FRA and internal railroad policies. Mechanisms are already in place to address these situations should they occur.

The rail industry applauds the dedication of this committee to advancing rail safety, and we are committed to working with you, others in Congress, the FRA, our customers, our employees, and others to ensure that rail safety continues to improve.